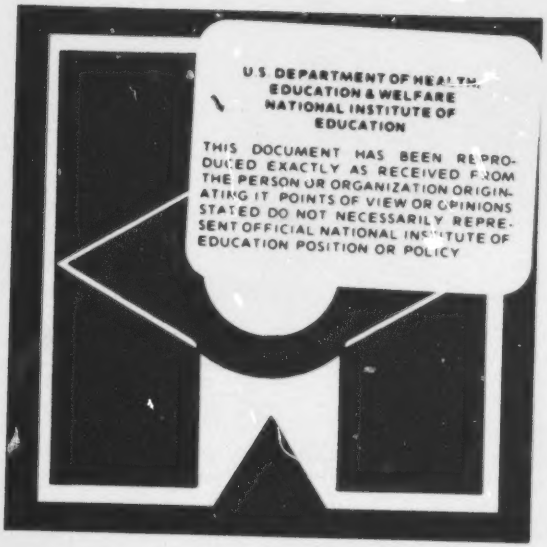
ED 124 702 BASIC SUBSTANTIVE LAW FOR PARALEGALS: CONTRACTS, TORTS, AND DUE PROCESS.

1 OF 1 MARCIN, RAYMOND B. NATIONAL PARALEGAL INST., WASHINGTON, D.C.

73 81P.

JUN 21 1976

ED124702


U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

# Basic Substantive Law for Paralegals: Contracts, Torts, and Due Process

by
Raymond B. Marcin
Assistant Professor of Law
The Columbus School of Law
The Catholic University of America

2

©National Paralegal Institute
1973

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL BY MICROFICHE ONLY HAS BEEN GRANTED BY

William Fry

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER.

CE002248

This document was prepared, in part, pursuant to a grant from the Office of Economic Opportunity Washington, D.C. to the National Paralegal Institute. The opinions expressed herein are those of the author and should not be construed as representing the opinions or policy of any agency of the United States Government.

# Basic Substantive Law for Paralegals: Contracts, Torts, and Due Process

by
Raymond B. Marcin
Assistant Professor of Law
The Columbus School of Law
The Catholic University of America

© National Paralegal Institute
1973

## PREFACE

This text is written for paralegal trainees. It should be studied by the paralegal trainee, if possible, only as part of a paralegal training program.

The text comprises an overview of the basic legal concepts usually found in introductory law courses in contracts, torts, and the due process area of constitutional law.

TABLE OF CONTENTS

Preface . . . . . i

PART ONE: CONTRACTS

Chapter One: Introduction . . . . . 1

Chapter Two: What's a contract? . . . . . 2

Chapter Three: Mutual Assent: Offer and Acceptance . . . . . .3

Chapter Four: Consideration . . . . . 8

Chapter Five: Legal Capacity of Parties . . . . . 10

Chapter Six: Lawfulness . . . . . 12

Chapter Seven: The Parol Evidence Rule . . . . . .15

Chapter Eight: Third Party Beneficiaries . . . . . .16

Chapter Nine: Breach of Contract . . . . . .18

Chapter Ten: Applying the Law of Contracts . . . . . .20

PART TWO: TORTS

Chapter One: History . . . . . .24

Chapter Two: But What's a Tort? . . . . . 29

Chapter Three: Intentional Torts . . . . . .31

Chapter Four: Defenses to Intentional Torts . . . . . 34

Chapter Five: Negligence . . . . . .37

Chapter Six: Defenses to Negligence . . . . . 41

Chapter Seven: Torts by Public Officials . . . . . 43

Chapter Eight: Strict Liability Torts . . . . . 45

Chapter Nine: Nuisance . . . . . .50

Chapter Ten: Misrepresentation . . . . . .51

TABLE OF CONTENTS (continued)

PART THREE: DUE PROCESS

Chapter One: An Ancient Right . . . . . 52

Chapter Two: The Fuentes Case . . . . . 54

Chapter Three: The Gault Case . . . . . 56

Chapter Four: Incorporation and The Bill of Rights . . . . . .60

Chapter Five: A Case Study . . . . . .63

Part I

CONTRACTS

Chapter 1

INTRODUCTION

When Don Vito Corleone was asked how he expected to be able to persuade the owner of a lucrative Las Vegas gambling casino to sell his business to the Corleone "family", he rasped "I'll make him an offer he can't refuse."

No, the law of contracts does not extend its protections to the Godfather-type "contracts" (we'll see later in this part the legal defects of the Corleone sales contract), but contracts do pervade our daily lives. From the simple purchase of a morning newspaper, through the routine use of a gasoline credit card, to the once-in-a-lifetime purchase of an expensive home, our lives are ruled by the law of contracts. To be more exact, we rule ourselves and others through the law of contracts. How so? When the government wants to make certain that the citizenry will perform some essential act (e.g., pay taxes), it passes a law, and the courts will require the citizenry to adhere to the provisions of the law. When two private citizens want to make certain that each will perform some essential act (e.g., pay the purchase price of a house, deliver the deed to the house), they too pass a law, a law which binds only them but which will nonetheless be enforced by the courts -- they enter into a contract. A contract is indeed a law, a law that is very limited in scope and applicability, but a law nonetheless. For, by it, private citizens obtain for themselves a certain measure of governmental power -- the power to enforce through court action, compliance with the requirements of the contract, and the power to obtain,

through court action, a remedy for noncompliance with those requirements. Are there limits to this ability of the private citizen to write laws? Of course. Don Vito's casino purchase contract certainly falls outside those limits. What then are the limits? They are the set of principles by which and situations in which the government will enforce private contracts. They are the law of contracts.

## Chapter 2

## WHAT'S A CONTRACT?

Let's focus for a moment on a fairly routine example: You have a house that you want to sell. I'm in the market for a good house. We dicker a bit and finally zero in on a price of $35,000 for your house. We've reached an agreement (both of us agree that $35,000 is a fair price for your house), but have we made a contract? Not yet. What's missing? Neither of us has as yet promised anything. In a transaction of this magnitude, probably both of us will want some clear assurance that the deal will go through. How do we get that assurance? We enter into a contract, i.e.,we exchange certain promises, most probably in writing. So I promise to buy your house for $35,000, payment to be made on February 1 of next year, and you promise to turn over the deed to your house to me on February 1 of next year upon receipt of the $35,000. That's our contract. If either of us breaks his or her promise, the other of us can have confidence that the court will give a remedy for the breaking of the promise. What then is a contract? A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

In our example we used a set of two promises: I promised to pay you $35,000 on February 1 and you promised to deliver the deed on receipt of the payment on that date. May a contract consist of only one promise? Yes. A good example of this is the credit card transaction. You have your gas tank filled and then

you hand over your credit card to the gas station attendant. By using your credit card you are promising to pay for the gasoline at a later date. The Oil Company's part of the contract, however, is already completed; they've given you the gasoline; no promise is needed. Thus you and the oil company have entered into a contract in which the only promise is yours.

You may ask: "Have I really made a promise? I didn't say a word; just used the credit card." This brings us to the meaning of the word "promise," and to the understanding that not all promises need be verbal or written. In the law of contracts, a promise is an expression of intention to act or refrain from acting in a specified way, so made as to justify another in understanding that a commitment has been made. The "expression of intention" may be in words, of course, as in our example of the house purchase transaction. Or it may be in the form of something other than words, e.g., the use of a credit card (take a quick glance at the fine print on the back of your own gasoline credit card). It may be in the form of inaction or pure passive acceptance, as in the eating of food in a restaurant.

By now we should have a fair idea of what a contract is. The bulk of the remainder of this part will deal with the law of contracts, i.e., the elements of the contract that are essential to assure court enforcement of it. What are those elements? They are four in number: (1) mutual assent, (2) consideration, (3) legal capacity of the parties, and (4) lawfulness of the contract itself.

## Chapter 3.

## MUTUAL ASSENT: OFFER AND ACCEPTANCE

Every valid contract must have the mutual assent of both parties: there must be an offer and there must be an acceptance of that offer. A simple enough proposition, but let's explore it with an example: an automobile purchase transaction. How often would you expect to hear the statement "I offer to sell

you my 1966 compact sedan for $400"? Aside from the price consideration, you'd almost never hear the formal words "I offer ..." You'd be more likely to hear something like "I've decided to ask $400 for my car." Is that an offer? Can anyone force you to sell your car for $400 by immediately accepting that "offer"? Most probably not, and this illustrates one of the essential requirements of a valid offer. The offer must show present, serious contractual intent. Suppose you said to a group of acquaintances "The first person who gives me $469 can have my car." Is that an offer? Does it show present, serious contractual intent? Very bluntly, yes. But what if the same statement were made by a used car salesman. Would it still be an offer? Which car is being offered? Very probably, if that statement were made by a used car dealer it would not be a valid offer because it lacks another of the essential elements of an offer. The essential terms of an offer must be certain. The identity of the item, the price, the person to whom the offer is made (the offeree), all these are essential terms and must be stated with certainty in the offer.

Advertisements. The question is sometimes raised whether newspaper or television advertisements are valid contractual offers. "Giant Savings at all Schlockhouse Outlets in the Greater Metropolitan Area -- Supersplash Color TVs -- $300." Is this an offer by Schlockhouse to sell any member of the public a Supersplash color TV at $300? Most would think so, but courts have more often found such ads to be mere invitations rather than offers because the exact item to be sold is not specified. Some ads, however, are specific enough to qualify as genuine contractual offers, particularly ads stating rewards for the return of specified lost merchandise or for the winning of contests. Very often automobile ads are specific enough to be genuine offers. Not long ago in Connecticut a used car agency ran an ad with a picture of a particular late model used car

over the statement "Only 1200 bananas and you can have this beauty." A court ultimately ordered the used car company to turn the car over to an enterprising member of the public who had appeared at the car lot and tendered the requisite 1200 bananas.

Termination of Offers. An offer (and the power to accept it) continues until it is terminated in one of five ways: (1) lapse of time, (2) revocation, (3) rejection, (4) death or insanity on the part of the offeror, or (5) supervening illegality. E.g., A reduction in the offering price for the sale of a house which is specified to be valid for "this week only" cannot be accepted next week. It has terminated by lapse of time. Suppose no time is specified as in the following example: I offer to buy your house for $35,000. Without rejecting my offer you proceed to wait several weeks until, no better offer having been received, you decide to accept my offer. Meanwhile I have committed myself to purchase someone else's house. Was my original $35,000 offer still valid? Probably not because where no time limit is specified in an offer, courts will hold that it lapses in "a reasonable time." I, of course, could have protected myself by revoking my $35,000 offer before committing myself to the other purchase. Also, if you had rejected by $35,000 offer, you could not, by purporting to accept it even just a moment later, bind me in a contract. Your rejection of the offer terminated it.

Acceptance. Acceptance of an offer completes the contract. It may be given by word or by deed. (In a very few instances which we will not touch upon here acceptance may be accomplished by mere silence or inaction.) Acceptance of an offer to sell merchandise is usually effected by merely handing over, or "tendering", the money. Acceptance of an offer to sell when the transaction is not to be completed then and there (e.g. the sale of a house) is usually effected by the tendering of consent to the terms of the offer. For example I might offer to sell you my house for $35,000 if you will promise to pay the $35,000 by February 1. You appropriately accept my offer by promising to pay the $35,000

by February 1.

Variant Acceptance. There is a shadow-land of difficulty in the area of offer and acceptance. Let's approach it with an example. Suppose I offer to sell you a food freezer for $500. In response you say "I accept your offer provided you knock the price down to $400." Have you "accepted" my offer? No, of course not. What you have done, however, is to make a counter-offer to me which I am then free to accept or reject or ignore. The general rule is that an "acceptance" which varies the terms of the offer or which adds new terms is not an acceptance at all but is merely a counter-offer. But suppose, again, I offer to sell you the freezer for $500 and you say in response: "I accept your offer provided the freezer is avocado in color." Have you accepted my offer? Careful now. There is an exception to the general rule in sales transactions under the Uniform Commercial Code (the U.C.C.). The U.C.C. is a large compendium of statutes purporting to cover virtually the entire field of commercial transactions. It has been enacted in its original text or in an amended version in every state except Louisiana. Section 2-207 of the U.C.C. provides that, in sales transactions, additional or different terms in an acceptance become a part of the contract unless (1) they materially alter the terms of the offer or (2) the offeror gives prompt notification of his objection to them or (3) the offer itself expressly limits acceptance to its terms as stated. The U.C.C. rule, it should be stressed, applies only to sales contracts. In offers of other than sales contracts the general rule strictly applies. Thus if you offer me a job as a bank teller and I reply: "I accept your offer provided I'm allowed to wear a sportshirt on the job," I have not accepted your offer. I have made a counter-offer to you.

Unconscionability. The offer and the acceptance of that offer comprise the mutual assent that gives the contract its validity. When forces interfere with or significantly diminish the voluntariness of the acceptance of an offer there is, then, no genuine mutual assent and the court will not enforce the resultant

"contract." The clearest example of a force interfering with the voluntariness of an acceptance is the Godfather-type offer: "I'll make him an offer he can't refuse." No court, knowing that physical coercion was used to secure an "acceptance", would enforce the resultant "contract." There are other, subtler interferences with voluntariness that deserve a detailed examination. Suppose that there are two contracting parties. One is highly experienced, adept at techniques of influencing people, and thoroughly knowledgeable in the mechanisms of the business transaction. The other is inexperienced, uneducated, and perhaps even illiterate. The resultant contract, predictably, is stacked highly in favor of the former and gives almost nothing to the latter. Will the court enforce such a contract? The United States Court of Appeals for the District of Columbia, focusing on just such a contract, made the following pronouncement:

> [W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld. Williams v. Walker-Thomas Furniture Company, 350 F. 2d 445 (D. C. Cir. 1965).

Nonconformance. We have said that for mutual assent an offer and an acceptance of that offer are necessary. Suppose you are shopping for a refrigerator. I, a salesman, show you a Deluxe Commander Frost Free model and quote an asking price of $295. You eagerly accept, agree to pay the $295, and arrange for the delivery. When my truck leaves the refrigerator off at your home you discover that it's the cheaper Ensign model. Are you bound by your acceptance? Must you pay the $295? No, your acceptance was not as to the Ensign refrigerator. You have no contractual obligation to pay for it. You do, however, have a contract requiring the delivery of the Commander model.

Chapter 4

CONSIDERATION

The first essential element in every valid contract is mutual assent. We now move on to the second essential element -- consideration. By "consideration" lawyers do not mean a proper respect for the dignity of others (although that type of consideration does have its place in the law of contracts; see the discussion on unconscionability in chapter 3). "Consideration" is a term of legal art and, in the law of contracts, it means simply the price bargained for and paid in exchange for a promise. To say that consideration is a "price" does not necessarily mean that it is money, although in a simple contractual transaction it often is. Consideration, more often than not, is a promise itself. Let's look at an example again: I agree to buy your house for $35,000 and promise to pay the $35,000 on February 1. You agree to deliver the deed on receipt of the $35,000 on February 1. What is the price bargained for and paid in exchange for my promise to pay the $35,000 on February 1? The price for my promise is your promise to deliver the deed. Take another example. I promise to give my car to the first person who gives me $100. What's the price (or consideration) for my promise to give my car away? In this example the price for my promise is money. The $100 serves as the consideration or price for my promise.

The notion of consideration contains two necessary elements. Consideration, to be legal, must be sufficient and adequate. The two adjectives, though similar, do not have the same meaning.

When, then, is consideration sufficient? When what is bargained for and given in exchange for the promise amounts to a benefit to the promisor or a detriment to the promisee. Suppose you promise to deliver the deed to your house to me on February 1, and I, for my part, promise merely to accept the deed to your house (no mention of money). Does my promise to accept the deed to your house amount to a benefit to you? to a detriment to me? In both cases the answer is most probably no. (The tax and realty aficionados among

us can probably think of examples involving houses with large tax liens and other encumbrances which would render the acceptance of the deed a definite detriment to me and the unloading of the deed a definite benefit to you. Very often what seems insufficient consideration can by virtue of circumstances be completely sufficient).

The rule on sufficiency of consideration (a benefit to the promisor or a detriment to the promisee) must not be confused with the rule on adequacy of consideration. The general rule on adequacy of consideration is a somewhat surprising concept: courts will not inquire into the adequacy of consideration. There is adequacy of consideration in the sale of a $35,000 house for $3,500. There is, however, a completely humane exception to the rather negative rule on adequacy of consideration. Courts will measure the adequacy of consideration when fraud is suggested. Also, remember the discussion of unconscionability in Chapter 3.

Mutuality of Obligation. Closely connected with and perhaps a part of the law of consideration is the law of mutuality of obligation: i.e., each promise in a contract must be legally binding or the contract is void. Let's look at some examples: (1) "I promise to sell you my car for $400 unless I change my mind." Have I, in reality, promised anything at all? Of course not. So there is a lack of mutuality when one of the promises in reality promises nothing at all. (2) An automobile salesman promises to throw in seat belts for an extra $20 in the sale of a new car. Is the automobile salesman promising anything which he is not already obligated by law to do. No, the law requires seatbelts in all new cars offered for sale and the attempt to secure an extra $20 is, then, unenforceable. (3) I promise to pay you the $100 I lost to you in a poker game. If we live in a state in which gambling is

illegal, my promise to pay you the $100 is unenforceable; you have no right to collect it.

The Seal. One final note on the law of consideration deserves brief mention. Occasionally, one notice the designation "L.S." after the signature on a contract. "L.S." stands for "locus sigilli" or "the place of the seal." The wax seal on a contract used to take the place of the doctrine of consideration. But modern laws, including the U.C.C., have largely done away with the seal and its former significance.

## Chapter 5

## Legal Capacity of Parties

Not everyone, of course, has the legal capacity to enter into a contract. Children and persons who are mentally ill are, in most states, prohibited from or severely restricted in making contracts. In most cases, the contractual needs of such persons are handled by court appointed guardians. How does one's legal capacity affect his or her "contracts"? Let's look at an example or two: Sue Sweet, seventeen years old and planning to be married in the spring as soon as she graduates from high school answers the doorbell on Saturday afternoon to find a pleasant looking gentleman with a large suitcase. The gentleman explains that he is a cookware salesman and proceeds to tell an interested Sue all about his product. Sue, interested in filling her hopechest with practical items, signs an order form and a contract obligating her to pay a mere two dollars per week until the purchase price of $399 plus interest at one and one half per cent per month is paid off. Must Sue pay all that money? Is there any way she can get out from under the contract? Unconscionability may occur to some of you as a way to attack the contract, and if (as is probable) the cookware is worth far less than the $399, it would be an effective approach. But there is a more direct approach. Sue is only 17 years old, and if she lives in a state in which the "age of majority" is 18 or higher, she may quite legally and properly disavow her contract.

She doesn't have to do so but she may, and probably on five minutes reflection will. Contracts of an infant (a person who has not yet reached the age of majority) are voidable at the option of the infant. Suppose Sue began making the payments. Could she then stop or has she, by beginning to make the payments, accepted the contract? Sue may disavow the contract at any time before she reaches the age of majority, even after she begins performing it. What happens if she reaches her age of majority? An infant who reaches his or her age of majority may disaffirm the contract or (and here's where Sue has to be careful) may affirm it. In any case, in each of the above examples, the cookware company is bound on its end of the contract as long as Sue has not disaffirmed her end.

There are, of course, necessary exceptions to this rule on the voidability of infants' contracts (or else we might never experience the thrill of listening to the Osmonds or the Jackson Five). Humane laws exist in most states protecting the rights of children under professional entertainment contracts. In this area of exceptions, let's carry our example a step further. Sue, still 17, marries her fiance, Paul Lucien, wh is also 17 and living on his own as a baseball pitcher in the minor leagues. Assume another salesman comes to Sue's home and sells her a set of encyclopedias. In many states, Sue would have to honor her contract because, though still only seventeen, she is "emancipated". Similarly Paul would be bound by the terms of his baseball contract, because he too is emancipated. Now lets change the example slightly. Sue and Paul, though married, are living with Paul's parents and are being supported by both sets of parents until both finish college (they are not emancipated). Sue and Paul go out one day and purchase a bed, a dinette set, and a stereo set. They are bound by the purchase of the bed and the dinette set and not bound (may disaffirm) the purchase of the stereo. How so? In most states infants are bound by their contracts when the contracts are for "necessaries". The bed and the dinette set are clearly necessaries, the stereo is clearly a luxury. But what of our original example of the cookware? Might not the cookware be considered a

"necessary"? Suppose, as is arguable, that the cookware is a necessary. Does Sue then have to pay the full $399 plus interest? Not necessarily. Infants must pay for the reasonable value (note: not necessarily the agreed-on price of necessaries ).

Other examples of lack of legal capacity exist. In some few states wives are restricted in their abilities to enter into contracts (though nowadays these old laws are certainly suspect as being unconstitutional). A more frequent example is the lack of legal capacity of mentally ill persons. Some lawyers' files are replete with stories of the contracts entered into by mentally retarded or mentally ill persons living in sheltered environments answering magazine ads. These contracts are fortunately void or voidable in most states.

## Chapter 6.

## LAWFULNESS

Contracts which are outlawed by statute or by case law interpreting public policy are void. In most states gambling debts are uncollectable and contracts for their payment are legally void. This is a clear example of an outlawed contract.

Other types of outlawed contracts are not so clear but are much more frequent in occurrence than the gambling contract. Many states have outlawed "referral sales" schemes, schemes whereby a salesman convinces a person to buy an expensive item (a home vacuum-cleaning unit; a burglar alarm system; a swimming pool) by agreeing to a lessening of the purchase price or dividends upon the sale of similar items to persons whose names appear on a list given by the purchaser. More and more states are outlawing such schemes and contracts made in the context of those schemes in those states are void. Another example of an outlawed contract arises occasionally in the area of contracts for the repayment of loans. All states have usury laws which place ceilings on the percentage of interest which may be charged on loans of money, and some states are by statute or by case law extending their usury provisions to the retail installment sales context,

especially in the area of credit-card purchases. Contracts which violate the usury laws are void in most states. In some, however, the contract may be held to be void only as to the amount of interest charged over the usury ceiling, and valid as to the rest.

Many contracts may be held to be void or voidable in whole or in part because they do not conform to the requirements of certain state statutes. This is especially prevalent in the retail installment sales financing and small loan areas, i.e., the consumer credit field. Congress has enacted the Federal Consumer Protection Act of 1968 and many if not most states have similar consumer protection laws. Regulation Z, issued by the Board of Governors of the Federal Reserve System has implemented the Truth in Lending Act so as to require the disclosure by the merchant or creditor of a great deal of relevant information concerning the finance charges involved in the transaction. It is not our purpose in this overview of the law of contracts to go deeply into federal or state statutory law, and we will content ourselves now with the observation that violations of the various federal and state consumer protection laws can have a considerable effect on the validity of a contract.

Another legal device which often affects the lawfulness, and therefore the enforceability, of a contract is the Statute of Frauds. The name "statute of frauds" reflects the origin of the law as a means to curtail and eliminate contract frauds, and is not descriptive (or indeed even helpful) in studying its significance today. Way back, in our original example, you will remember I promised to buy your house for $35,000, payment to be made on February 1 of next year. Because of the ease with which I could, in the interim between now and February 1, change my mind and (unscrupulous though it may be) deny that I ever promised to pay the $35,000, you would be a fool not to have insisted upon some record of the promise that would belie my disavowal. And here, in this instance, the law helps even the foolhardy. For such contracts, i.e., contracts for the

sale of real property, are almost universally required by the statutes of frauds in most states to be in writing and to be signed by both or all parties.

The general rule, to which the Statute of Frauds is an exception, is that, apart from statute, the formality of a writing is unnecessary for the validity of a contract. What types of contracts besides contracts for the sale of realty are usually covered by statutes of frauds? Several are worth noting: (1) promises to answer for the debt of another (e.g., you cosign for my purchase of a car, (2) contracts for the leasing of land or housing for longer than a specified period of time, usually a year (e.g., you lease an apartment for two years), (3) employment contracts for longer than a specified period of time, usually one year, and (4) contracts for the sale of goods of a certain value or upwards (the Uniform Commercial Code uses the value of $500). Contracts in each of those five areas must be in writing or else the parties may not enforce them.

The written memorandum of the contract, of course, has to be thorough enough to satisfy the Statute of Frauds. The usual requirements for the written memorandum of a contract are that it identify the parties, the subject matter, and the consideration.

With the last four chapters we have delved into the four essential elements of a contract: (1) mutual assent, (2) consideration, (3) legal capacity, and (4) lawfulness. Chapters 7,8, and 9 will lead us into some of the subtleties and nuances attendant on the law of contracts and some of the practical ways in which breaches of contracts may be remedied.

Chapter 7

THE PAROL EVIDENCE RULE

The parol evidence rule, you may rightly guess, has nothing whatsoever to do with persons on probation from correctional institutions. It is, however, a subtle part of the law of contracts to which persons who read and advise on legal contracts should have some exposure. Let's take a look again at our original example: I promise to buy your house for $35,000, payment to be made on February 1 of next year, and you promise to deliver the deed to me on receipt of $35,000 on February 1. Our agreement is put in writing, we are identified, the house is described by metes and bounds and the price is mentioned correctly. But, in our earlier dealings on the house, you had promised me that the $35,000 would include not only the house but also the washer and dryer in the basement and the playground equipment in the back yard. When I take possession of your house on the afternoon of February 1, I discover that the machines and the equipment have been removed. Can I enforce your promise to include those items in with the house? No, they were not included in the written memorandum of our contract for the sale and purchase of the house, and your promise cannot be enforced by me.

The Parol Evidence Rule -- When a contract is expressed in a writing which is intended to be the complete and final expression of the rights and duties of the parties, parol (oral) evidence of prior oral or written negotiations or agreements of the parties or of their contemporaneous oral agreements, which varies or contradicts the written contract, is not admissible in evidence in court. Notice the word "prior" as it appears in the rule. Evidence is admissible of subsequent oral contracts which vary or even discharge

the previous contract. And notice also that, for the parol evidence rule to apply, there must not only be a written memorandum, but that memorandum must be intended to be the complete and final expression of the rights and duties of the parties.

## Chapter 8

## THIRD PARTY BENEFICIARIES

We know by now that, when one party to a contract breaks his or her contractual promise, the other may invoke the jurisdiction of a court to get a remedy for the breach. But suppose others, not party to the contract, have an interest in it. Can they sue as well? The general answer is "no," but an exception exists in a type of transaction that sometimes occurs: the third-party beneficiary transaction.

Let's look at an example: Malcolm Schlepp, not long ago, purchased a set of encyclopedias from Edward Fast, a salesman for the Universal Encyclopedia Corporation. Malcolm gave Edward the full $400 purchase price and directed him to send the encyclopedias to Alfred Schlepp, his nephew. Edward pockets the money, but no encyclopedias are ever delivered. Who has the right to enforce the contract for the purchase of the encyclopedias? Malcolm? Alfred?

The Rule -- Under American law, Alfred, though not a formal party to the contract, is considered a beneficiary of it -- a third-party beneficiary. Third-party beneficiaries are entitled to enforce a contract if they are (1) donee or gift beneficiaries or (2) creditor beneficiaries of the promisee. In our example, if Malcolm intended to make a gift of the encyclopedias to Alfred, Alfred would be a donee beneficiary and as such entitled to sue Edward and the ency-

clopedia company. And if Malcolm intended to repay a debt to Alfred (e.g., Malcolm had borrowed Alfred's encyclopedias and had negligently lost or destroyed them), then Alfred would be a creditor beneficiary and as such entitled to sue Edward and the encyclopedia company. What's the difference, you ask? Why bother to discern whether Alfred is a donee or a creditor beneficiary, if he can sue in either case? The difference is that Malcolm may sue in the latter case but not in the former. Malcolm has the right to enforce a creditor-beneficiary contract, but not a donee-beneficiary contract. Why so? The rule seems somewhat unfair, but it stems from a historical recognition that donors of a gift have suffered no real, tangible harm if the gift is damaged. Their harm is more in the sense of outrage and anger than in the area of dollars and cents. In the creditor-beneficiary transaction, however, the promisee (Malcolm) does suffer a tangible loss if the property is not delivered -- he still owes the debt. Of course, if both Malcolm and Alfred sue, as they both properly may in a creditor-beneficiary situation, only one may recover the damages (or the court might apportion the amount between them; there can be no double-recovery of damages). Third-party beneficiary donee transactions are especially prevalent in family situations and the creditor-beneficiary-type transactions tend to occur more often in the commerical setting.

Chapter 9

BREACH OF CONTRACT

We've mentioned several times in the preceding chapters a party's right to enforce the contract, to ask the court for a remedy, and to seek judicial relief. We've been vague on just what type of remedy or relief a court can give. It's time now to look at just what happens when someone commits a breach of contract.

The first question we come upon is whether every breach of a promise made in a contract by one party entitles the other to seek some court enforcement. And the answer is "no," not every breach is actionable. Suppose that in our contract for the purchase and sale of the $35,000 house, the house is utterly destroyed by flood or gas main explosion or other cause for which the seller is not responsible. Must the seller deliver the house on the February 1 closing date or face court action? No, the law relieves the seller from his obligation because of the doctrine of impossibility of performance. The seller could, of course, be required by court order to return any money already paid by the purchaser (e.g., down payment). Other types of legally proper excuses for a breach of contract are (1) supervening illegality (a party rents store space in a yet-to-be-built shopping center and a promised zoning change does not occur), (2) frustration of purpose (the store renter in the previous example orders commercial supplies which, because he can not open his store, are useless to him), (3) the other party's breach (February 1 rolls around and I don't pay you the $35,000 for your house; you, of course, are excused from delivering the deed to me), (4) lack of notice or demand (you never formally demand that I pay the $35,000 even though February 1 has long passed), and (5) waiver of nonperformance (you excuse me from my obligations in the deal).

But suppose the breach is not excused by reason of any of the above situations. What, then, may the wronged party do? He or she may seek at least three different types of remedy. (1) Damages. E.g., I fail to pay the $35,000 dollars on February 1. You are forced, because of a loosening of the housing market between the time of our contract and February 1, to sell your house to another person for $32,500. Your damages because of my breach of contract are $2,500. I.e., were it not for my breach of contract, you would have $2,500 more than you have now. (2) Specific performance. Let's take a converse example. February 1 rolls around and I dutifully offer you the $35,000. You, however, refuse to accept it and refuse to turn over the deed to the house. I may then have to pay $37,500 for a house with similar features in a similar setting and therefore sue you in damages for $2,500. But suppose I want your house and nothing else. Can I seek a court order compelling you to turn over the deed? Yes, I can sue to require you to "specifically perform" your end of our contract. (3) Restitution. Suppose, when February 1 rolls around, you refuse to accept the money from me and refuse to turn over the deed, and further suppose that I had paid you $500 at the time we entered our contract. I can, unless I ask for specific performance, sue you in restitution to recover the $500 being held by you.

Anticipatory Repudiation. Suppose on January 2 you sell the house to someone else. It is now impossible for you to live up to our contract. What remedies do I have? I have each of the above remedies for general breach of contract, i.e., damages, specific performance, and restitution, and in addition I may use your "anticipatory" breach as an excuse for my own breach (I had in the meantime found another house I liked better and had no intention of meeting my February commitment to you) or I may use your anticipatory breach as a dis-

charge of our contract (I had reassessed my own financial condition and realized that $35,000 was more than I should lay out, so I'm just as happy to be released from the contract as you). For an anticipatory repudiation to be effective so as to entitle the party to all those remedies, however, it must be positive and unequivocal. I may not invoke any of those remedies if you merely approach me with the suggestion that we tear up our contract. And finally, anticipatory repudiation is often used as a defense, a way of justifying one's own breach of contract.

## Chapter 10

## APPLYING THE LAW OF CONTRACTS

The time has come for us to look at a contract, or, more precisely, at the written memorandum of a contract. The contract which follows is no doubt similar to many you've seen in the past. It's a retail installment contract for consumer goods. The extent to which you are able to dissect it into its legal components will be some measure of your grasp of the law of contracts.

### RETAIL INSTALLMENT CONTRACT

Date of Sale: September 22, 1971 Account No.: 7-384

1. Parties. Seller: Numode Appliances, Inc., 140 Jay Street, Brooklyn, New York. Buyer: Harvey Prentice, 1432 Pacific Street, Brooklyn, New York.

2. Terms and Conditions. The Seller hereby sells and the Buyer hereby buys, upon the terms and conditions set forth below, the following property:

Description of property: Color television console (Contemporary)

Make: MX Model No.: MX301 Serial No.: 427391

Delivery Address: Same as above.

1. Cash Price (including sales tax). . . . . $629.95

2. Less: Cash Down Payment. . . . . $29.95

Trade-In. . . . . None

Total Down Payment. . . . . $ 29.95

3. Unpaid Balance . . . . . $600.00

4. Other Charges . . . . . None

5. Amount Financed . . . . . $600.00

6. Finance (Credit Service) Charge . . . . . $ 58.00

7. Total of Payments . . . . . $658.00

8. Deferred Payment Price . . . . . $687.95

9. Annual Percentage Rate . . . . . 17.50%

First Installment Date: November 1, 1971

3. Payment of total payments. The Buyer shall pay the total of payments of $658 in 12 consecutive monthly installments of $54.83 each, except the last installment which shall be $54.87, payable on the same day of each month and commencing on the first installment date stated above to the Seller, or its assignee.

4. Delinquency charge. The Buyer shall pay a delinquency and collection charge on each installment in default for a period of ten days in an amount equal to 5% of such installment or $5, whichever is less.

5. Notice to buyer.

NOTICE TO THE BUYER: 1. DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. 2. YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS AGREEMENT. 3. UNDER THE LAW, YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS TO OBTAIN A PARTIAL REFUND OF THE FINANCE (CREDIT SERVICE) CHARGE BASED ON THE "SUM OF THE DIGITS" FORMULA KNOWN AS THE "RULE OF 78."

RECEIPT IS ACKNOWLEDGED BY THE BUYER OF A TRUE EXECUTED COPY OF THIS CONTRACT.

RETAIL INSTALLMENT
CONTRACT

_____
Buyer

_____
Co-Buyer

_____
Seller

by _____
Title

It will be seen at the outset that this is in reality not one contract, but at least two and possibly more. There is, of course, the simple sale and purchase of a TV set, and there is, somewhat more subtly, the purchase and sale of credit.

Lets walk through the contract(s) together, this time with you supplying the answers.

1. What did the Buyer promise?
2. What did the Seller promise?
3. Was there mutual assent?
4. What was the consideration for the Buyer's promises?
5. What was the consideration for the Seller's promises?
6. Was the consideration sufficient in each instance?
7. Look up the retail installment sales laws in your state. Would this contract have been lawful in your state?

8. Assume the Seller promised that a rotating antenna would be included in the purchase price of the TV set and that the promise was made before the written contract was made out. What are the Buyer's chances of getting a court to enforce that promise?

9. Assume that the TV set is really only worth about $100 and that the Buyer neither spoke nor understood the English language, was completely inexperienced in transactions of this type, and relied completely on the glowing promises and representations made by the Salesman in the Buyer's native language. Is there any rule of law that would help the Buyer avoid the contract?

10. Assume the Buyer bought the TV as a gift for a friend and that (contrary to the indication in the written contract above) he directed the Seller to ship the TV to the friend. Could the Buyer sue if the TV was never delivered?

11. Assume that the Seller never delivers the TV to the Buyer. What remedies are available to the Buyer?

Part II

TORTS

Chapter 1

HISTORY

The dictionary correctly, but not very helpfully, defines a "tort" as a "wrong." A practicing lawyer might define a "tort" as a "civil crime." Each definition is accurate to a point, but each is also hopelessly incomplete. In truth the tort, as perhaps no other concept in the law, is mainly the product of history. It is indeed a richly historical concoction whose ingredients hark back beyond the golden era of common law development in this country to an almost forgotten time -- the misty era of trial by knightly combat in medieval England.

Fully nine centuries ago, at about the time of the Norman Conquest of England in 1066, neither the government nor the people focused much on the distinction between the public and the private injuries that resulted from criminal conduct. A violent misdeed such as a physical assault on the person of another was certainly seen as a crime and was punishable in all manner of imaginative ways: outlawry, dismemberment, a fine, etc. And trial, in many parts of the land, was by battle (the alleged wrongdoer and the accuser would engage in combat, the victor winning the "lawsuit"; trial by combat fell into disuse early in the Norman rule, however), an ordeal (the veracity of the accused and the accuser being tested by surviving or failing to survive an ordeal like prolonged dunking or exposure to hot, searing coals), or by "wager of law" (each litigant employed a certain number of (usually 12) oath-helpers who had to swear in an intricate, stylized manner to the truth of every part of their master's case, slip-ups determining the loser.)

Shortly after 1066 there arose a forum for the handling of lawsuits which was far more attractive to, and safer for, the litigants -- the King's Courts. Cases were decided by Royal commissioners on the basis of arguments and on the basis of the recommendations of a rudimentary form of the jury. Moreover, in larger measure, the fines came to be shared with the injured party in the King's Courts.

And so, in order to escape the absurdly brutal and savage modes of trial in many of the inferior courts of the day, persons injured by the criminal conduct of others began filing their complaints with the King's Courts and began designing their complaints so as to predispose the King's Courts to share the criminal fine with them. These carefully worded complaints came to be known as "writs of trespass" and as the Courts grew more and more accustomed to awarding the fine to the injured accuser, the civil action of trespass emerged and became fixed. Trespass, then, was the original "civil crime." And it is to trespass that we owe the development of modern tort law.

Trespass itself very quickly divided into three separate types: (1) trespass upon the person of another (e.g., a physical assault); (2) trespass upon the land of another (e.g., an unauthorized entry); and (3) trespass to the belongings, or chattels, of another (e.g., cattle rustling). The first type of trespass, i.e., upon the person of another, resulted in the development of a legal concept which is the basis of the major portion of tort law today. The action of trespass upon the person of another (trespass vi et armis) could be brought to obtain compensation for all manner of direct injuries. In time it could be brought even if the direct injury was only accidental.

A few examples will help here: If Robin Hood shot an arrow at Sir Guy and wounded him, Sir Guy would bring an action of trespass vi et armis against Robin Hood. And if Robin Hood shot an arrow at the King's deer and, by accident, missed the deer and hit Sir Guy, wounding him, Sir Guy would bring the very same action of trespass vi et armis. At the trial, all Sir Guy would have to prove is that Robin Hood loosed the arrow that injured him. Now suppose Sir Guy was not injured by the direct act of Robin. Suppose Robin merely left his quiver of arrows on the pathway and Sir Guy stumbled over it, wounding himself in the fall. Could Sir Guy sue Robin Hood in trespass vi et armis to get compensated for the injuries he suffered in the fall? For a long time he could not, because the injuries were only indirectly due to the action of Robin Hood. For decades litigants brought suits in the King's Courts to obtain compensation for these indirect types of injuries only to be told that the highly stylized wording of the writ of trespass didn't fit their type of complaint. Then, in 1285, Parliament passed the Statute of Westminster which provided a device whereby litigants like our Sir Guy could get their complaints of indirect injuries heard by the King's Courts -- the new device was a new form of lawsuit, an action for "trespass on the case." In the new action of trespass on the case, however, the litigant had to prove more than the fact that his or her injury was caused by the act of the accused -- the litigant had to prove that his or her injury was caused by the fault of the accused. And so the notion of fault, still very much with us today, entered our jurisprudence.

The notion of fault became so commonly accepted that in 1850 the Massachusetts supreme court, in a holding that has been uniformly followed ever since,

required a showing of fault in cases involving all types of personal trespass injuries, direct and indirect. Thus was our present-day law of negligence, far and away the most prevalently litigated tort, born. And it is worth noting that the birth of negligence law, with its insistent stress on the notion of fault, occurred when the risk-shifting device of insurance was, as far as the ordinary citizen was concerned, still very much in its infancy.

The notion of fault, of course, developed as it was litigated. The classic case of Palsgraf v. Long Island Railroad Company, decided by the New York Court of Appeals in 1928, gave us our present-day formulation of the fault concept: the litigant must prove that the act that caused his injury was intentional or "that the act as to him had possibilities of danger so many and apparant as to entitle him to be protected against the doing of it though the harm was unintended." Some prefer to view the legal idea of fault as existing where the circumstances give rise to a duty on the part of the alleged wrongdoer to use ordinary care to avoid injuring another.

But the idea of fault, though it permeates the largest subdivision of tort law, i.e., negligence, does not permeate all tort law. In some types of tort law, the idea of fault has been removed completely by statute. Thus workmen's compensation laws impose a strict or absolute liability on an employer for injuries sustained by his or her employees on the job. In other types of tort law, the idea of fault has been gradually removed by developing case law. Thus manufacturers are being held, with greater and greater frequency, strictly liable for personal injury caused by a defect in their products. An area of tort law in which the necessity of proving fault was done away with early on is the case involving liability for damage caused by certain ultra-hazardous activity such as the use of explosives in blasting and construction.

An interesting area of tort law in which the fault concept has had its ups and downs is the liability of charitable institutions, churches, hospitals, schools, and the like, for torts committed by their employees. Early case law evolved the principle that charitable institutions should not, for humane reasons, be held liable for torts committed by their employees. Later case law and legislation, however, has reversed that early policy and, because of the easy availability of insurance and the notion that the injured party should not go uncompensated, charitable institutions are subject to ordinary fault liability for torts committed by their employees.

Finally, the latest development in the history of tort law is the movement toward no-fault insurance in cases of accidents between motor vehicles. We've already mentioned two thoughts that have a bearing on the recent rapid rise in interest in no-fault auto insurance. (1) Negligence law developed when insurance, as far as the ordinary consumer was concerned, was in its infancy. It is only now that insurance is having its proper impact on the fault concept of negligence law. (2) Negligence law is, far and away, the most prevalently litigated subdivision of tort law. Automobile accident law, similarly, forms the bulk of negligence law. The natural tendency to try to dispose of the greatest number of lawsuits in the most efficient manner is a pressure that is leading many to look to no-fault insurance as a way out of the nigh impossible glut of auto accident cases crowding court dockets today.

And so we've had a quick glimpse at the history of tort law, and at some of the interacting pressures that have gone into the formation of our present day notions of tort liability.

## Chapter 2

### BUT WHAT'S A TORT?

You say you still, after all that historical analysis, don't know exactly what a tort is? Maybe that's because no universally accepted definition exists. But maybe an example or two will take us a bit further toward a partially satisfactory definition, at least. Take the following narrative:

Peter Perfect was not having one of his better days. Job pressures had been getting to him, and so, in an effort to leave his work problems downtown, Peter, before going home, stopped in at the corner tavern and ordered his customary champagne cocktail. Meanwhile, Lou Lush, who was not having one of his better days either, had, for a number of hours and over a number of bourbons, been haranguing the bartender about "pinkoes, hippies and fags." Inexplicably, the interruption by Peter Perfect seemed to enrage Lou, and Peter's request for a "champagne cocktail" seemed to push Lou Lush over the brink. Without warning, Lou brought a half-empty whisky bottle crashing down over Peter's head.

Here we have a tort. You will note the similarity between Lou's tort of assault and battery and Lou's crime of assault and battery. They are, of course, identical. Here we are confronted with the first step in understanding what a tort is. It is similar to a crime. Indeed every crime which causes injury to the person or property of another will also be a tort. The reverse, however, is not true. Every tort is not a crime. What makes Lou's action here a tort? <u>It's a tort</u>, not because it's a crime, but <u>because it involves an interference with a right of person, property, or reputation which the law protects</u>. In our example the law protects Peter's right not to have his person invaded by a whisky bottle. What kind of a tort was it? Was it a

negligent tort? No, of course not, Lou's conduct was not negligent or accidental, it was deliberate and intentional. This was, then, an intentional tort. What other types are there?

Well, there's the negligent tort. Suppose Lou, who was after all understandably wobbly, did not mind Peter's interruption at all, in fact was totally unaware of it. Instead, when the bartender diverted his attention to Peter's order, Lou began to climb down from his stool, but in so doing, collapsed into Peter's stool, causing Peter to crack his head nastily on the rail. Lou, not even knowing that Peter was there, did not intend to injure him. The fall was an accident. Nevertheless, the accident was clearly Lou's fault; a little more control over his alcohol input and he would have negotiated the stool departure with ease and without incident. This is a negligent tort, an injury caused by an accident that was someone's fault. Any other type of tort?

There's the strict liability tort, and perhaps we can, by stretching a bit, arrange our example to illustrate this last type of tort. Assume the tavern is next door to a construction site on which a building is being demolished. The workman properly uses a small but effective charge of dynamite. Whistles give warning of the impending blast. All the required safety equipment is present and in order. The charge is detonated. Inexplicably, a brick from the demolition site shoots a hundred feet or so out from the debris, crashes through the tavern window and crowns Peter. Nobody was negligent. Nobody intended injury. And yet a tort has been committed. In certain types of cases, principally involving extrahazardous substances like explosives, the law of torts has developed to the point where strict tort liability is imposed though the injury was neither intentionally nor negligently caused.

So what's a tort? It's an invasion of or an interference with some right of person or property which the law in some way protects. What rights of person or property does the law protect? The answer to that question is the law of torts.

## Chapter 3

## INTENTIONAL TORTS

There are at least seven types of intentional torts: battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to belongings or chattels, and conversion. There are other types of intentional torts, e.g., intentional interference with a contract right, defamation, but the seven named are perhaps the seven most frequently found in litigation. We'll take them one at a time.

(1) Battery. Our original example is a blunt portrayal of a battery: Lou Lush, unprovoked, slammed Peter Perfect over the head with a whisky bottle. For a battery, two elements are necessary: intent to cause harmful or offensive contact with the person of another or a third person (or intent to cause an imminent apprehension of such contact) and resultant harmful contact. Both the following examples are batteries: Lou Lush never intended to strike Peter, only to frighten him, but the bottle slipped and flew into Peter's face. Lou threw the bottle deliberately at Peter but missed him and hit Bella Bystander instead. Again, for a battery to be proven, we need intent to cause harmful contact or the fear of such contact and resultant harmful contact. Lou threw the bottle at Peter but missed Peter and Bella both and the bottle merely smashed against the wall -- No Battery.

(2) Assault. The very last example which we concluded did not amount to a battery does indeed amount to an assault: Lou tries to hit Peter with the bottle but misses him and only frightens him. For an assault, two elements are necessary: intent to cause harmful or offensive contact with the person of another or a third person (or intent to cause an imminent apprehension of such contact) and resultant imminent apprehension. Suppose Peter, quietly sipping his champagne cocktail, is completely oblivious to Lou's inept attempt to hit him. No imminent apprehension - no assault.

(3) False Imprisonment. The obvious example of the tort of false imprisonment is the actual imprisoning of a person on false charges. E.g., a political dissenter whose activities annoy the police is arrested and imprisoned on false charges. But the tort extends far beyond the concept of actual imprisonment. Suppose Lou, instead of hitting Peter, backed Peter into a corner and menacingly refused to let him leave until he had a double-bourbon. That's false imprisonment too. The elements of false imprisonment are: intent to confine another or a third person (Bella is also falsely imprisoned if she is crunched into the corner with Peter), resultant confinement, and the confined party's consciousness of or harm by reason of the confinement. Suppose, after the incident, the bartender locks Lou in a back room while he calls the police. False imprisonment? No, transitory or harmless confinement is not false imprisonment.

(4) Intentional Infliction of Emotional Distress. Lou tells Peter, falsely, that while he was on his way to the tavern, he saw firemen trying

to control a raging inferno at Peter's house. The elements of the tort of intentional infliction of emotional distress are: intent to cause severe emotional distress by extreme or outrageous conduct, or (even in the absence of intent) recklessness in causing such distress by such conduct.

(5) Trespass to Land. With trespass to land we leave the area of invasions of or interferences with the person of another. Now we're talking about one's property rights. The elements of the tort of trespass to land are: intentionally entering land in the possession of another, intentionally causing a thing or third person to do so, or intentionally remaining on land in the possession of another after having been ordered to leave. Each of the following examples involves a trespass to land. Compare them to the elements of the tort of trespass to land. (a) Lou follows Peter home and drives right onto Peter's driveway. (b) Peter invites Lou into his house to discuss their points of disagreement; Lou becomes bellicose and refuses to leave after Peter orders him out. (c) Lou walks away leaving his locked car in Peter's driveway. (d) Lou finally removes his car, but as he drives away he tosses a load of trash onto Peter's lawn.

(6) Trespass to Chattels. Trespass to chattels isn't found in litigation nearly as often as the next tort, conversion, but it is mentioned here because of its obvious connection with trespass to land. One point of difference, however, exists. In trespass to land no actual damage need exist: the bare entry onto land, the mere footfall, can be a trespass to land. A trespass to chattels must involve damage to or destruction of the chattel or

belonging, however. E.g., Lou intentionally smashes Peter's windshield with a tire iron.

(7) Conversion. Perhaps the most common of the intentional torts is conversion, an intentional interference with the belongings of another. The tort of conversion can occur in a number of ways: (a) taking someone's belongings. E.g., Lou outright steals Peter's car. This is a crime, of course, grand larceny, but it is also a tort -- conversion. Similarly, Lou tells Peter's wife that Peter authorized him to take the car, and Lou takes it. That's a conversion too. (b) destroying someone's belongings. Lou, finding Peter's car parked near a cliff, pushes it over. That's a conversion. (c) using someone's belonging in excess of one's authority. Peter lets Lou use his car to visit a sick aunt in the hospital, and Lou takes a joy-ride with half a dozen of his cronies. (d) receiving possession of a converted item. After stealing Peter's car, Lou gives it to Bella, who accepts it with knowledge that it is stolen. (e) misdelivery by someone entrusted with someone else's belongings. Peter lets Lou, a part-time mechanic, try to fix Peter's car. Lou fixes it and lets Bella drive it around. (f) refusing to surrender a belonging. Lou fixes Peter's car but refuses to return it until Peter pays him an outrageously exorbitant fee.

## Chapter 4

## DEFENSES TO INTENTIONAL TORTS

We've looked at the elements of the various intentional torts and should, by this time, have some idea of what has to be proven to make out a valid case

of battery, assault, etc. Now we step lightly over the line and onto the other side of the case. We're now concerned with the various defenses that can be invoked to defeat an intentional tort complaint.

(1) Privilege. Sometimes individuals, especially governmental and law enforcement officers, may commit acts which would ordinarily be intentional torts, but which, because of the officer's duties and other attendant circumstances, are privileged. E.g., A policeman, pursuing Lou Lush, after he left the scene of an accident he caused, drives onto Lou's driveway. No trespass -- strict compliance with the law made the officer's conduct privileged. But, a government intelligence officer, sensing that Lou might have some connection with organized crime, enters Lou's house and plants a bug. That's a trespass.

(2) Mistake. This defense touches upon the "intent" necessary in the commission of an intentional tort. If Lou drive onto Peter's driveway in the mistaken belief that it was his own, there would, of course, be no trespass. But intent and lack of intent are far more complex than they seem on the surface. E.g., there was proper and sufficient intent to commit a battery when Lou threw the bottle at Peter but missed and hit Bella. He didn't intend to hit Bella to be sure, but his general intent was certainly tortious, and so the defense of mistake would not be available to Lou. Consider the following examples: (a) The G-man without a warrant bugs Bella's telephone mistakenly believing it to be Lou's. (b) The G-man, with a defective warrant but one which he reasonably but mistakenly believes to be valid, bugs Lou's phone.

In the former example the G-man has committed a trespass and does not have the defense of mistake. In the latter example, the G-man has also committed a trespass (his act was not in fact privileged; the warrant was invalid), but he does have available to him the defense of mistake.

(3) Consent. The consent may be implied or actual. The following example often occurs: A policeman, without a search warrant, comes to Lou's door, questions him about participation in the numbers racket, and asks to be allowed to search the house. Lou says "Sure! I've got nothing to hide." The resultant search is done with Lou's actual consent. If Lou later sues for trespass, the policeman has the defense of consent.

(4) Self-defense. E.g., Lou hit Peter with a bottle because Peter was coming at him with a gun. The battery is vulnerable to the defense of self-defense. Suppose Lou mistakenly believed Peter was reaching for a gun. Would he have the defense of mistake?

(5) Defense of others. E.g., Lou hit Peter with a bottle because Peter had trained his gun on Bella.

(6) Defense of Property. E.g., Lou hit Peter with the bottle because Peter was in the process of rifling the bartender's cash register.

(7) Recapture of Chattels (or Belongings). E.g., Lou works for a finance company and Peter has defaulted in making the time payments on his car. The installment contract authorizes the finance company to repossess the car. Lou walks onto Peter's driveway and repossesses the car. If Peter then sued Lou for trespass, Lou would have the defense of "recapture of chattles." Caveat -

The recapture must be accomplished peaceably. If the car were locked in Peter's garage, Lou could not break in and repossess it.

(8) Necessity. This is an infrequently raised but nonetheless valid defense to the intentional tort, and, like mistake, it speaks to the "intent" requirement of intentional torts. E.g., Lou, a dog warden, shoots Peter's dog which is obviously and actively rabid. Or, Lou, a forest ranger, deliberately enters Peter's timberland and burns it down in order to contain a forest fire and keep it from reaching a town.

## Chapter 5

## NEGLIGENCE

We have gone through a brief outline of the various intentional torts. We now take up an area of tort law that cannot be overemphasized, the oft-litigated nonintentional tort -- negligence. Let's begin with an example.

Jack Cass, while driving home from work one day, had his mind on other things. And so it was that he didn't notice the newly installed stop sign at the crossroads. As a result of his momentary lapse, Jack's car collided with a car driven by Guy Good, damaging both cars and injuring Guy.

Jack has committed the tort of negligence. Immediately we can see what the tort of negligence is not. It is not an intentional tort; Jack would have to be berserk to ram his car into Guy's intentionally. What, then, is the tort of negligence? Let's see if we can pick out the elements of the tort of negligence by going over the example.

First, what was Jack doing or not doing that resulted in the accident? He was going through a stop sign, and he wasn't paying attention to the road.

The accident would almost certainly have been avoided if Jack had stopped at the stop sign and had paid attention to his driving, i.e., if Jack had behaved as any reasonable driver should. The first element of the tort of negligence is the existence of a duty. In Jack's case it was the duty to obey the rules of the road and to drive attentively. And, of course, it was the breach of that duty that caused the accident. The second element of negligence, then, is the breach or the failure to perform the duty. Have we established all the elements of negligence yet? No, not yet. Jack could have breached his duty to be attentive and obey stop signs and still there might have been no negligence. What else is necessary? The collision, of course, and the resultant damage. Jack's breach of duty has to be the cause of the damage. And so, we have four elements in the tort of negligence: (1) a duty to conform to a certain standard of conduct for the protection of others, (2) a breach or failure to perform that duty, (3) resultant actual loss or damage, and (4) a reasonably close causal connection between the act and the injury.

Let's change the example around a bit to check out each of the elements of negligence. Suppose Jack was attentive and broke no laws and breached no duties, and he still caused the accident and the resultant damage. E.g., Jack was driving his brand new sedan when the brakes suddenly failed, and the steering wheel came off in his hand. Here we have the last two elements, resultant damage, and Jack's being the cause of it, but not the first two, the duty and its breach. So here there would be no negligence. This is an example of an unavoidable accident.

Again, suppose Jack did indeed breach his duty to drive attentively, and his inattentiveness caused the collision. But, both cars being equipped with

air bags and impact resistent bumpers, there is no damage or injury. Without damage or injury there is nothing to sue for and the tort of negligence cannot be established.

The Reasonable Person. Some of you may have noticed that we skimmed over that idea of duty rather quickly. It's clear that Jack had a duty to obey the traffic laws but what law imposes a duty on him to be attentive? How do we go about determining what duties there are whose breach will give rise to a negligence claim? I.e. What is the standard of conduct which one must conform to in order to avoid being found negligent? The simple answer years of litigation has given us is: The standard of conduct to which one must conform to avoid being negligent is that of a reasonable person under like circumstances. A reasonable person, while driving, will certainly be attentive to the road and to his or her driving.

The "reasonable person" standard often varies markedly depending upon the identity of the actual person. Jack is a normal adult driver, so the reasonable person standard as applied to him is that of a normal adult driver. But in other contexts the reasonable person standard might be quite different. E.g. the standard of behavior of a five-year old pedestrian is that of a reasonable five-year old pedestrian, not that of a reasonable person in general. I.e. A completely reasonable five-year old might well be unable to read and so the duty to obey warning signs will be reduced and may be eliminated when applied to a five-year old. Similarly the standard of conduct for a blind person or a lame person, etc. is that of a reasonable blind person or a lame person, etc. Conversely, the standard of conduct required of a person who is a physician or a lawyer, etc., is that of a reasonable physician or a lawyer,

etc.

Suppose Jack had obeyed all the traffic laws. Could he still be found negligent? If a reasonable man under the same circumstances would have done more than merely obey all extant laws, then Jack could indeed be found negligent. E.g., Jack is driving barely within the legal speed limit on an icy road in a blizzard. A reasonable driver would certainly lessen his speed considerably.

Res Ipsa Loquitur. Negligence is sometimes, though not often, inferred even in the absence of positive proof of the breach of a duty of care. The event, however, must be of a kind that is inexplicable in the absence of negligence. E.g., Jack is a passenger on an airliner which disappears without a trace. Damages for Jack's death could be collected even though there is no positive evidence of negligence by the airline company.

Proximate Cause. In order for a person to be held liable for another's injury, it is necessary not only that he or she be shown to have breached a duty of care but also that the breach of the duty be shown to have been the proximate cause of the injury. E.g., The manufacturer of Jack's car carelessly installed defective seatbelts. While Jack is seated in his car preparing to start it, a cinder block from a nearby construction site strikes the roof of the car, injuring Jack. The manufacturer clearly breached its duty of care in installing the defective seatbelt, but that breach obviously was not the proximate cause of the injury to Jack. Now suppose Jack had started the car and it was moving when the cinder block squashed it. Was the manufacturer's carelessness the proximate cause of Jack's injuries? Depending upon the location and type of injuries, the answer becomes quite arguable. And the issue

of proximate cause is often litigated. Courts have, over the years, devised a test for determining which of several possibilities is the proximate cause of the injury -- the substantial factor test. If the breach of the duty of care is a substantial factor in causing the injury, it is to be regarded as the proximate cause.

Imputed Negligence. As a general rule, an employer is liable for the negligent acts of his or her employee whenever those negligent acts are committed in the course of his employment. E.g., Suppose Jack, when he ran the stop sign and collided with Guy, was driving his boss's delivery truck on an errand for the boss. Guy can sue not only Jack but his boss as well. Again, as a general rule, the owner of a car is liable for the negligent act of a person driving the car with the owner's permission. And, as a corrollary to that rule, most states have created a presumption of permission in the case of the owner and the driver being members of the same household.

## Chapter 6

## DEFENSES TO NEGLIGENCE

There are several defenses to a complaint of negligence, defenses which might be applicable even to the rather glaring circumstances of our original example in which Jack Cass neglected to stop at a stop sign and collided with Guy Good.

Contributory Negligence. Contributory negligence is conduct on the part of the plaintiff (i.e., Guy Good) which falls below the standard to which he should conform for his own protection, and which is a legally contributory cause

cooperating with the negligence of the defendant in bringing about the plaintiff's harm. What does all that mean? It means that if Guy Good was also negligent, then he can't win a negligence lawsuit against Jack Cass. Let's change the example to illustrate both the contributory negligence rule and its harshness. Guy Good, while absent-mindedly waving to a friend, steps off the curb without looking and checking on any oncoming traffic. Jack, careening down the street at breakneck speed with reckless abandon, strikes Guy, injuring him. In those states which allow contributory negligence as a defense, Guy, because he was jaywalking, could not collect a cent from Jack for his injuries. I.e., even though Jack's negligence was gross and Guy's slight, Guy still can't win the lawsuit.

In many states, contributory negligence is still the rule. Some states have tempered its harshness however by use of the doctrine of the last clear chance. Thus, if Jack could have, by swerving, avoided Guy, then Jack would have had the last clear chance to avoid the accident and his defense of contributory negligence would not be accepted.

Comparative Negligence. Some states have tempered the harshness of the contributory negligence rule by doing away with it entirely and substituting a new rule whereby the percentage of the injury or damage that is attributable to the negligence of the plaintiff will be applied against him or her and the defendant will be required to pay only that percentage of the injury or damage that is attributable to his or her negligence. The loss, in simpler words, is apportioned between the plaintiff and the defendant. In the above example in which Guy is the injured pedestrian, Jack would probably be found to have

been 95% responsible for the injury and Guy 5% responsible.

Assumption of the Risk. A plaintiff who voluntarily assumes the risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. E.g., Jack Cass takes a friend on a joy ride. The friend encourages Jack as he careens around at high speed. The friend has "assumed the risk" of injury from Jack's negligent driving. Automobile "guest statutes" in many states affect the defense of assumption of the risk and the provisions of your state's guest statute, if any, should be studied.

## Chapter 7

## TORTS BY PUBLIC OFFICIALS

Tyrone Horneigh, an elderly man, while walking through the park on the day after a snowstorm, fell and hurt himself on a poorly shoveled and icy portion of the municipal sidewalk.

John Goodfellow, a divinity student, while working part-time with a community action program, complained to a city election official that several of the program's clients were improperly denied their right to vote, and was thrown by the irate official down a flight of stairs.

What do Mr. Horneigh and Mr. Goodfellow have in common? Each has been the victim of a tort committed by a government employee. Mr. Horneigh's complaint sounds in negligence by reason of the failure of the town and its employees to shovel the sidewalk properly. Mr. Goodfellow's complaint, of course, sounds in battery. Under the principle of imputed liability, which we looked into earlier, we might expect that Mr. Horneigh and Mr. Goodfellow

would have the right to sue not only the employees whose tortious conduct caused their injuries but also the employer, i.e., the town or city itself. In the ordinary case, where the employer is a private citizen or company, there is no problem --the employer may be sued. But where the employer is a governmental entity problems arise which necessitate our treating this area of tort law in a separate chapter.

The principal problem in suing a government -- the United States of America, a state, a town, a political subdivision -- is found in the Eleventh Amendment to our federal Constitution. It has often been said that the Eleventh Amendment prohibits suits against the federal, state, or municipal governments unless the government gives its consent to be sued. Recent inroads have been made which chip away somewhat at the universality of that rule of law, but the practitioner still has to contend with it.

Most states have laws on their statute books which give a blanket consent for municipalities and the state to be sued in cases arising out of the torts of government employees. Some states limit this consent to cases arising out of negligence. For the practitioner, nothing short of a complete grasp of every intricacy involved in those consent statutes will do. E.g., Under many state consent laws, Mr. Horneigh will forever lose his right to sue the town unless he gives notice of his intent to sue the town to the proper official within ten days of his accident. Other notice-of-intent-to-sue deadlines might be longer and less rigid, but the point should not be lost that nothing short of a thorough knowledge of the state's consent laws should not be tolerated. Many is the young lawyer who found him- or herself in huge hassels because he or she off-handedly looked at the statute of

limitations and neglected to apply the notice-of-intent limitation.

Some states have, by statute, created boards or commissions to hear and decide complaints against the government. Often the decisions of these boards have to be ratified by the state legislature.

Mr. Goodfellow's complaint is illustrative of another phenomenon quite common in the area of suits against the government. Very likely, Mr. Goodfellow's federal civil rights have been violated by the tortious conduct of the city election official. Tortious conduct committed under "color" of a state or municipal law, statute, ordinance, or even a state or municipal custom or usage, is often a violation of the federal civil rights law as well. The significance of this overlapping for Mr. Goodfellow is that he may bring his lawsuit in a federal court. He may well prefer the federal forum for fear (founded or unfounded) that the municipal court might (consciously or unconsciously) favor the government employee.

The paralegal should, at least, be aware that torts complaints involving the government present special problems that require expert handling.

## Chapter 8

## STRICT LIABILITY TORTS

Ultrahazardous activity. Not long ago in the northwestern part of our country near the Great Divide, a number of sheep ranchers found that many of the sheep in their flocks were suddenly dying and others were exhibiting disturbing symptoms of illness. The proximity of the ranches involved to a U.S. military chemical and biological installation caused some to suggest that the sheep had suffered some exposure to one or another of the poisonous gases stored

at the installation. The ranchers were reimbursed for their losses by the U.S. government without any prolonged litigation. There was no showing of negligence, no proof of fault. This example illustrates in a practical way the third type of tort -- the strict liability tort. Had the ranchers filed suits and had the suits gone to trial, the ranchers would not have had to prove fault on the part of the government, because the government was engaging in an ultrahazardous activity, i.e., the manufacture and storage of nerve gas and other chemical and biological horrors. Other types of ultrahazardous activity and substances which courts have recognized as giving rise to strict liability are explosives, inflammable liquids, blastings, pile driving, crop dusting, oil well drilling, excavations, and the like.

Workmen's Compensation Laws. On-the-job injuries to workmen presented particular problems very early on in the development of the law of negligence. It was a rare case indeed in which the injured workman was able to collect anything from his employer. Four causes combined to place the ordinary workman at a decided disadvantage: (1) The workman was less wealthy than his employer and had considerably less access to competent legal help. (2) The doctrine of contributory negligence often stood as a complete bar to his recovery of any money from his negligent employer. (3) The doctrine of "assumption of the risk" stood in his way even if he got over the hurdle of contributory negligence. (4) A harsh rule called the "fellow servant doctrine" excused the employer from liability when the injury was caused by a fellow employee. When increasing industrialization resulted in multiplied industrial accidents the plight of the injured workman slowly seeped into the consciousness

of lawmakers. Finally, by the 1880s, virtually all states had enacted workmen's compensation laws, placing strict liability on the employer for accidents sustained by employees in the course of their employment. Compensation for injuries suffered on-the-job is determined by a set schedule written into the laws, and most employers now have workmen's compensation insurance.

Manufacturers' Liability. In more recent times there has been a dramatic development in the law on the liability of manufacturers for personal injuries caused by defects in their products. Like the workman's plight under industrialization, the consumer's plight under a developing marketing system soon became all but hopeless. If a car owner bought his car from Henry Ford and the brakes failed causing him injuries, he could quite obviously sue Henry Ford. But when the car owner bought his car from a retail dealership, which in turn bought it from a wholesale shipper, who in turn bought it from a manufacturer, who in turn purchased the brake assemblage from another wholesaler, who in turn purchased it from another manufacturer,etc., who can the poor car owner sue? Aside from the need to hire a team of investigators to find out who made the defective brakes, the consumer had a couple of legal doctrines to block his or her way as well. In theory, the manufacturer whose negligence caused the car accident would be sued either under principles of contract law or under principles of tort law. If the consumer chose contract law he would have to satisfy the court that he had a contractual relationship with the manufacturer (lawyers would say the consumer had to show "privity of contract" with the manufacturer), and of course he could make no such showing because it took an investigation just to find out who the manufacturer was.

If the consumer chose tort law, i.e., negligence, as his approach, he would have to show that the manufacturer, whom he has never heard of and who has never heard of him, had a duty of care with respect to him. And this tort difficulty was almost insurmountable. But, as the lesser of two evils, the tort approach did offer the barest chance of success and did, as it was tried again and again, result in the development of a body of law imposing strict liability on manufacturers for defects in their products which cause injury to the public. The first breakthrough came in the case of MacPherson v. Buick in which the manufacture of the motor car was analogized to the manufacture of a hazardous substance. Justice Cardozo said in that case:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

In other subject matter areas other legal doctrines began to come to the rescue of the consumer. In the area of the manufacturer of foodstuffs the doctrine of "res ipsa loquitur" often succeeded. Finally in 1964 a rule of law was announced in the scholarly treatise, the Restatement of Torts Second, suggesting the imposition of strict liability on manufacturers for injuries and damages caused by defective products, regardless of negligence or fault. The new rule, which has been adopted already in some states, protects all members of the public regardless of whether they were purchasers of the product.

No-fault automobile insurance. Perhaps a discussion of no-fault automobile insurance belongs in a chapter headed "no liability torts" rather than "strict liability torts." But no-fault auto insurance is a kind of strict liability concept when looked at from the vantage point of the insurance company. There are many different kinds of no-fault auto insurance laws on the books already and many more in the drafting stage. Most of the laws on the books now are not pure no-fault laws; they are modified or compromise measures. The typical law might have some of the following provisions. It would cover accidents caused by negligence but not accidents caused by deliberate, willful conduct. It would take away one's right to sue to recover damages below a certain maximum, e.g., $50,000 for personal injury and $9,000 loss of wages. If one felt that his injuries would not be adequately compensated by the maximum allowed, he would then be entitled to sue for the overage. Below the maximum, however, awards are handled in somewhat the same manner as workmen's compensation awards, i.e., by a schedule of certain amounts of money for certain injuries. Let's look at our auto accident example again. Jack Cass and Guy Good have a collision caused by Jack's negligence. If they live in a state with a typical no-fault law, each would pay through his own insurance coverage for the damage done to his own car. Each would collect through his own insurance coverage for expenses attributable to his own injuries up to $50,000 and to loss of wages up to $9,000. If, for example, Guy suffered a broken neck and was hopelessly paralyzed he could, of course, sue Jack in a negligence action to recover considerably more than the $50,000.

Chapter 9

NUISANCE

Nuisance is a unique tort. It cannot be classified as an intentional tort or as a negligent tort or as a strict liability tort. It has elements of all three types of torts. What's a nuisance? Let's look at an example or two. (1) Sam Lumlord owns tenements. He routinely neglects them, allowing trash to accumulate in the common areas, and he refuses to fix defective garbage cans in the yard, with the result that rats infest the property and invade the homes of the tenants. (2) O. Leo Leahy owns a factory. He finds it cheaper not to separate chemicals which cause noxious odors from his manufacturing waste. The smokestacks of his factory spew foul odors over the city. (3) Little Alfred Newman, a precocious amateur rocket enthusiast stores liquid oxygen in a tool shed abutting his neighbor's back yard.

All three of the above examples involve legal nuisances. Sam and Alfred have committed non-trespassory invasions of another's interest in the private use of land. I.e., they have committed private nuisances. O. Leo Leahy, on the other hand, has been guilty of an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of their common rights. I.e., he has committed a public nuisance.

O. Leo Leahy, moreover, has committed an intentional tort sounding in negligence. He intentionally, to save money, inflicts nauseous odors on the citizenry. More than likely Lumlord's nuisance is of the negligence variety. He doesn't deliberately intend to inflict rats on his tenants; he negligently fails to di charge his duty to care for the common areas of the tenements. Alfred is committing a strict liability type of nuisance with his storage of an ultrahazardous substance in a residential neighborhood.

And so we see the complexity and the variety involved in the tort of nuisance. It may be public or private, intentional, negligent, or strict liability. This maleability of the tort of nuisance makes it amenable to constructive and imaginative use. A new tort of "slumlordism" is slowly (and somewhat haltingly at present) being developed from the continued use of the nuisance lawsuit to redress tenant-landlord grievances.

## Chapter 10

## MISREPRESENTATION

The final tort which we will consider here is the tort of misrepresentation or fraud. An example:

Al Smiley tells Joe Cool that he can make a million bucks selling shoes in his spare time, that if he invests the modest sum of $200, he can have the franchise to sell Continental brand shoes in his home town, that he will receive a complete sample kit with one left shoe sample of each shoe made by Continental, and that there is a ready market for Continental shoes in his area. Joe eagerly hands over the $200, relying on Al's glowing statements. Two weeks later, Joe receives his "franchise" in the mail, an embossed certificate authorizing him to sell Continental shoes and a small package with two cheaply made left shoes, one a pointy toed man's shoe and the other a spiked heel lady's shoe. Joe is sick. He has been the victim of the tort of misrepresentation.

Misrepresentation has five elements: (1) a <u>false representation</u> of fact made by the defendant; (2) <u>knowledge</u> (scienter) on the part of the defendant that the representation is false; (3) an <u>intention to induce</u> the plaintiff to act or not to act in reliance on the false representation; (4) <u>reliance</u> by the plaintiff on the false representation; and (5) resultant <u>damage</u> to the plaintiff.

PART III

DUE PROCESS

Chapter 1

AN ANCIENT RIGHT

We've all heard the phrase "due process of law." It appears again and again in the oratory of the courtroom and the political arena. But what does it mean? What is the "due process of law?"

The phrase "due process of law" appears but twice in our federal Constitution. The Fifth Amendment says:

> No person shall. . .be deprived of life, liberty, or property, without due process of law. . . .

And the Fourteenth Amendment says:

> No State shall. . .deprive any person of life, liberty, or property, without due process of law. . . .

The above sentences are at once both comforting and unsettling. They seem to secure our lives, our liberty, and our property from governmental interference, and yet they suggest also that with due process, the government can deprive us of life, liberty, and property. Is "due process of law," then, merely a "Catch-22" phrase, a clever little negating phrase stuck in with a high sounding pronouncement of right? Or is it something more, something worth knowing about?

Historians trace the origin of our due process clauses to the year 1215 in the England of the Crusades. It was then that King John, under considerable pressure, signed the Magna Carta, guaranteeing the rights of citizens.

Chapter 39 of the Magna Carta said:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

That phrase, "the law of the land" was the constitutional grandfather of our own "due process of law." Sir Edward Coke, a noted English jurist, defined the law of the land as "the common law, statute law, or custom of England," and especially in the years preceding our American Revolution, the phrase came to mean something like "the traditional rights of an Englishman." William Blackstone, commenting on the laws of England in the late eighteenth century, identified three fundamental or absolute rights of individuals: personal security, personal liberty and private property.

But what exactly is "due process of law?" Justice Frankfurter attempted a definition in 1951:

> Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process.

And Daniel Webster tried to put it more succinctly in his argument during the famous Dartmouth College case. He called "due process" a law "which hears before it condemns; which proceeds upon inquiry, and renders judgment only

after trial." So what does "due process" mean in terms of the citizen, and particularly in terms of the paralegal's client? Does it only mean that a person can't be fined, imprisoned, or executed except by some fair legal procedure? It means that, of course, and fortunately it means a lot more. Let's look at a case in point.

## Chapter 2

## THE FUENTES CASE

One day several years ago, Margarita Fuentes answered a knock on her apartment door. She found herself confronted by a deputy sheriff armed with some legal papers. The deputy said he was "serving a writ of replevin" on her. She quickly found out what "serving a writ of replevin" meant when the deputy and his helpers, in efficient fashion, lifted and took away her stereo set and her stove.

Earlier on that same day, the Firestone Tire and Rubber Company, from whose subsidiary Ms. Fuentes had purchased the stereo set and the stove, had filed a lawsuit in the local small claims court, claiming that she still owed $200 on the items. Ms. Fuentes, of course, knew nothing of the lawsuit. She in fact, was still fuming over Firestone's refusal to fix the stove. For several months the stove had been out of order, and Ms. Fuentes, after many unsuccessful attempts at getting the company to come out and service it, finally took the position that she would pay the $200 when Firestone fixed the stove. So it was that she found herself not only without the stove, but without her stereo as well.

Sensing some basic unfairness in the situation, she sought legal help. What followed were years of litigation, culminating on June 12, 1972, in a decision of the United States Supreme Court upholding Ms. Fuente's sense of

fairness. The Court held that the deputy sheriff, when he took Ms. Fuentes's stereo set and stove without giving her a chance to be heard in a proper legal setting, had deprived her of the stereo and the stove without due process of law. The Court said:

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must be notified.' . . .It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'

So here we have, for the first time in our inquiry, some practical idea of what due process means. The government can't take your property without giving you notification and a chance to be heard. Let's see what we can learn from the Fuentes case.

The first noticeable item in the fact situation is that the individual who took Ms. Fuentes's property was a deputy sheriff. This raises our first point of law on due process. Due process is binding on the government. Which government? All governments, federal, state, and municipal. The Fifth Amendment's due process clause binds the federal government, and the Fourteenth Amendment's due process clause binds the state and municipal governments. But what if the deputy sheriff weren't involved in the case? What if, as some state laws allow, workmen from Firestone were the ones who repossessed Ms. Fuentes's property? Would they be depriving her of her due process rights? Very probably yes. Private individuals, e.g., repossessors, are bound by the due process clause when the government has so involved itself with the activity as to make it governmental as well as private. E.g., the government has passed laws which permit a repossessor to commit what would otherwise be a tort or perhaps even a crime.

The second item we notice is that Ms. Fuentes herself is protected by the due process clause. The due process clause protects persons. Suppose Ms. Fuentes were not a United States citizen. Would she still be protected? Yes; the due process clause mentions persons not citizens.

Finally, we note that Ms. Fuentes's stereo set and her stove were taken away. She was, in other words, deprived of her property.

So, adding all the elements together, we find that, in the area of one's right to property, due process of law protects persons from a governmental taking without notice and an opportunity to be heard.

But we also said that due process of law protects one's life and liberty as well as one's property. Does "due process" mean anything more when one is threatened with loss of liberty, or even life, by some governmental action?

## Chapter 3

## THE GAULT CASE

On a late afternoon in June, some years ago, Ms. Gault returned home from work to find that her son Gerald was missing. Neighbors told her that Gerald had been taken into custody by a police officer early that day. Ms. Gault then went to the Juvenile Detention Home and, after verifying her son's presence there, asked why he had been taken into custody. She was told only that a hearing would be held the next day in Juvenile Court. On the next day, the police officer filed a petition with the Juvenile Court stating only that Gerald Gault was a delinquent minor and was in need of the protection of the court.

At the hearing that afternoon, Ms. Gault found out for the first time why it was that her son had been taken into custody. A Ms. Cook had complained that someone had made an obscene phone call to her, and Gerald was charged with

being that someone. Ms. Cook was not present at the hearing, and the police officer, without being placed under oath, told the Judge that Gerald had admitted making the phone call. The Judge told Ms. Gault that he would think the case over.

Two days later Gerald was released from custody and Ms. Gault received a notice informing her that further hearings would take place several days later.

The later hearing was attended by Gerald, his mother, his father (who had just returned from a job in a distant city), and two police officers. Again, the complainant, Ms. Cook, was not present. At the conclusion of the hearing, the Judge committed Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority, unless sooner discharged by due process of law."

Understandably shocked by the Judge's decision and deeply disturbed that Gerald had almost six years to go before he reached his majority, the Gaults sought legal help.

After three years of litigation, Gerald finally received his "due process of law" when the United States Supreme Court held that Gerald's delinquency hearing lacked many of the essentials of due process and fair treatment.

Gerald Gault's case, and the cases of two other children, Samuel Winship and Joseph McKeiver, established the meaning of "due process of law" in the juvenile delinquency setting. The Supreme Court has said that, while a juvenile delinquency hearing need not conform to <u>all</u> the requirements of a criminal trial, it must measure up to the essentials of due process and fair treatment. Specifically (and check these against the facts in Gerald Gault's case), the juvenile is entitled to appropriate notice of the accusation, the right to be represented by counsel (free of charge, if unable to afford one), the right of confrontation

of the accuser, the right of cross-examination, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt. Curiously, the right of trial by jury does not fall within the meaning of "due process" in the juvenile delinquency setting.

Thus far we've seen that "due process" means notice and the opportunity to be heard in civil matters concerning property rights, and means a great deal more in the juvenile court delinquency hearing setting. One by now should suspect that "due process" might mean even more in the criminal law setting. And so it does.

In very general language, due process of law in a criminal case requires (1) a law that describes the criminal offense adequately, (2) a court with proper jurisdiction over the offense and the person accused of committing the offense, (3) an accusation (information or indictment) in proper form, (4) notice of the accusation, (5) the opportunity for the accused to defend himself or herself, (6) trial before an impartial judge or judge and jury, (7) trial according to the traditionally established mode of criminal procedure, and (8) the right to be discharged unless found guilty. Court decisions, of course, have filled in many of the specifics of each of these generally-worded rights. For example, the fifth item, "the opportunity for the accused to defend himself or herself," includes, inter alia, one's right to counsel. And one's right to counsel is further specified by court decisions to include the right to be represented by counsel not only at the trial, but also at the critical pretrial stages, such as custodial interrogation by police and out-of-court lineup identifications. One's right to counsel also includes the right to have counsel appointed free of charge in the case of a person who cannot

afford to pay a lawyer.

We now have a clearer idea of how due process of law works. In some instances, e.g., the Fuentes case, a comparatively meagre set of essentials (notice and opportunity to be heard) applies. In other instances, e.g., cases of individuals charged with serious crimes, the full panoply of the eight essential elements with their specific breakdowns applies. And in between there is a shadowland where lawyers are even now opening new vistas.

Some of the new vistas of due process law have already received Supreme Court recognition. E.g., the areas of wage garnishment and discontinuance of welfare benefits without notice and opportunity for hearing. Other areas are still being litigated in the courts. Following are some of these new vistas: Repossessions of property by private individuals acting under landlord lien or commercial repossession laws; involuntary commitment to mental institutions without the essentials of due process; school suspensions without due process; and many, many more.

There are, of course, other older areas of the law involving property rights and rights to personal liberty and life which we have not touched upon but which have obvious connections with the due process clauses. These include: Eminent domain (the condemnation of realty by the government for government purposes); seizures by tax authorities; regulation of charges, rates, and prices; building restrictions, zoning restrictions, licensing requirements, public employment rights, etc.

"Due process of law" is far more than a little "catch-22" qualifying phrase. To say that it is a positive force securing our rights to life, liberty, and property from arbitrary government interference is, perhaps, accurate and probably not fully exhaustive of its positive implications. For, even taking into

account the many contexts of due process which we have mentioned but not fully explored along with the new vistas which lawyers are exploring today, there is another principle of due process law which strains the imagination.

## Chapter 4

## INCORPORATION AND THE BILL OF RIGHTS

On December 16, 1965, Mary Beth Tinker wore a black armband to school. The trouble was that only two days prior to the incident, the principals of all the schools in Mary Beth's town had met and had decided to suspend any student who wore a black armband to school. Mary Beth was, of course, suspended from school and, as in our other cases, she sought legal help. What followed were three years of litigation culminating finally in a decision of the United States Supreme Court vindicating Mary Beth. The Supreme Court said that, because she was wearing the armband as her way of urging a truce in the Vietnam War, the school principal in suspending her violated her First Amendment right to free speech.

What does one's right to freedom of speech have to do with "due process?" Free speech is guaranteed by the First Amendment. Due process is guaranteed by the Fifth and the Fourteenth Amendments. Certainly Mary Beth, in being prohibited from wearing the armband, was deprived of her liberty, but whether it was a deprivation without notice or opportunity to be heard or any of the other elements we've discussed, we are never told. No, what we're suggesting here is a new type of "due process," a type that has evolved from the way that the due process clauses are written into our Constitution.

Remember, there is one due process clause in the Fifth Amendment and another in the Fourteenth Amendment. The due process clause in the Fifth Amendment, as

all the other clauses in the Fifth Amendment and indeed all the clauses in each of the first eight amendments, is binding only on the federal government. None of the clauses in any of the first eight amendments is by its terms binding on any state government. They all by their terms bind only the federal government. It is, of course, the due process clause in the Fourteenth Amendment which binds state and municipal governments.

Soon after the passage of the Fourteenth Amendment, questions arose as to the scope of its coverage. Could a state government, for example, prohibit a person from freely exercising his or her religion by giving the person adequate notice and an opportunity to be heard and all the other procedural safeguards? The obvious answer was no, but the rule of law involved was not so obvious. Since the free exercise of religion clause is by its terms binding only on the federal government, what's to prevent a state government (which hypothetically has no such clause in its state constitution) from depriving a person of that "right?" The answer was found in the due process clause of the Fourteenth Amendment which is binding on the states and in the notion that that clause protects not only one's right to procedural fairness but also those rights which are "implicit in the concept of ordered liberty." Freedom of religion is implicit in the concept of ordered liberty and so is guaranteed by the due process clause of the Fourteenth Amendment against infringement by states.

Many other rights have been found to be covered under the due process clause of the Fourteenth Amendment, e.g., freedom of speech as in Mary Beth Tinker's case. In fact most, but not all, of the rights guaranteed by the first eight amendments to our federal Constitution are binding upon the states by reason of the due process clause of the Fourteenth Amendment. Following is a listing of those Bill of Rights guarantees which are binding upon state and municipal

governments: free speech, free press, freedom of religion, freedom of assembly, the right to petition the government, the right to be protected from unreasonable searches and seizures, the privilege against self-incrimination, double jeopardy, the procedural rights of confrontation, cross examination, counsel, speedy trial, the right not to be subjected to cruel and unusual punishments, and the right of trial by jury in criminal cases. Probably applicable to the states are the prohibition against taking private property for public use without just compensation and the right to a public trial. The following rights have not yet been found to be "implicit in the concept of ordered liberty" and, therefore, are not binding on state governments: the requirement of indictment by a grand jury, the right of trial by jury in civil cases, the prohibitions against excessive fines and excessive bail, the right to keep and bear arms, the prohibition against the quartering of soldiers in private homes, and the requirement of trial in the judicial district where a criminal offense was committed.

The above lists are not intended for any sort of memorization but only to give the reader a sense of the enormous scope of the due process clause of the Fourteenth Amendment.

There is a similar phenomenon at work in the due process clause of the Fifth Amendment which binds the federal government. "Due process" is often teamed up with "equal protection" in legal briefs and arguments. That is because the two guarantees sit side by side in the Fourteenth Amendment. States are prohibited from depriving people of the due process of law and the equal protection of the laws. The equal protection clause has been held to outlaw such things as state sanctioned racial discrimination, among many other things. There is, however, no equal protection clause in the Fifth Amendment or in any

other provision of the Constitution which is binding on the federal government. The due process clause in the Fifth Amendment has, however, been held to prohibit the federal government from infringing on one's right to the equal protection of the laws.

The foregoing was intended to serve as an overview of the vast scope of "due process." The student should not be (but probably is) alarmed at the enormity of the subject, for in the clinical situation "due process" boils down to a very few basic concepts of fairness. In the next chapter we will try to view "due process" in one of those clinical situations.

## Chapter 5

## A CASE STUDY

It is not likely that the paralegal will be confronted with the weightier aspects of "due process" which seem to abound in the case of an individual charged with a serious crime. But it is a virtual certainty that the paralegal will be deeply involved in problems of adequacy of notice and fairness of hearing in the everyday administrative agency context. Most likely the paralegal will be handling such matters as motor vehicle license reinstatement hearings, welfare fair hearings, small claims hearings, and the like. Following is a case study of a welfare fair hearing. The issues in the case have been simplified somewhat for the sake of brevity, and the names of the individuals involved have, of course, been changed.

On December 8, 1971, Mrs. Barbara Convergency visited the Legal Aid Society in Hartford, Connecticut. She told the interviewer that the welfare department was threatening to cut off her food stamp allotment and that she definitely needed the food stamps to help feed her two children. Her husband

had long ago vanished, and she and her children were living with her aunt and uncle. The welfare caseworker, she explained, told her that she would have to report her aunt and uncle's income or lose the food stamps. This, she said, she was not willing to do.

(At this point the word NOTICE should occur to the paralegal, and Ms. Convergency should be questioned as to the particular type of notice she received. Suppose the caseworker said something like this: "We've just found out that you're living with two other people. You'd better report their incomes, or we'll stop your food stamp allotment right now." Would that be sufficient notice? The uncharacteristic abrasiveness aside, that would not, of course, be sufficient notice to satisfy due process of law. The notice must be given a reasonable length of time prior to the threatened action, and the notice must be reasonable and adequate for its purpose. The abrasive statement gives Ms. Convergency very little to go on as to just why her food stamps are being cut off and as to what she can do about opposing the threatened action.)

In point of fact, the following notice was given to Ms. Convergency by her caseworker:

CONNECTICUT STATE WELFARE DEPARTMENT

NOTICE OF PROPOSED SUSPENSION, REDUCTION, OR DISCONTINUANCE OF ASSISTANCE

Case No. X-00000
Date Sent 12/7/71

Name Barbara Convergency
Address 550 Main Street, Hartford, Connecticut

Dear: _____

This is to notify you that the State Welfare Department is proposing to:

/ ___ / Suspend / ___ / Reduce / X / Discontinue

Your assistance because you have failed to report the incomes of all members of your household as is required under food stamp regulations.

If you are dissatisfied with the Department's proposed action, you may request a Fair Hearing by completing and mailing Form W-845 H "Request for a Fair Hearing" in duplicate to the Fair Hearings Section, State Welfare Department, 1000 Asylum Averue, Hartford, Connecticut, by 12-20-71 (Date).

Do not return form W-845 H if you agree with the Department's proposed action.

/ X / As the issue relating to your individual case is one of fact or judgment, if you request a Fair Hearing by the above date, your assistance will continue to the end of the assistance payment period in which the final decision on the Fair Hearing is rendered. If you request a Fair Hearing and the Department is upheld in its decision, you will be liable to repay the State Welfare Department for any monies expended while the Fair Hearing is pending.

If we do not hear from you by 12-23-71, your assistance will automatically be discontinued.

/ / This action is based on Department policy and assistance will not be continued beyond the above date.

If you are dissatisfied that your assistance will not continue beyond the above date, you may also contact your worker within fifteen days from the date of this notice for a conference to discuss your situation. You may speak for yourself or be represented by legal counsel or a friend or another spokesman at the conference. Whether the issue is one of fact or judgment or policy, your request for a conference does not in any way diminish your right to a Fair Hearing.

You have the right to request a Fair Hearing within thirty (30) days of the date you receive official notice of the action taken regarding your assistance. The request for a Fair Hearing must be made in writing and addressed to the State Welfare Department, 1000 Asylum Avenue, Hartford, Connecticut 06115.

Very truly yours,

Emily Garagiola
Caseworker

(Does the above document sound like reasonable and adequate notice? At first reading, it seems like a fairly clear presentation of what type of action is being taken and why. It also seems timely, allowing two weeks before assistance is cut off and allowing a full month to request a hearing. But circumstances can make what seems like reasonable and adequate notice completely unreasonable and inadequate. Suppose Ms. Garagiola knows that Ms. Convergency does not understand the English language or is unable to read. Would this type of notice then be sufficient? No, of course not. Ms. Garagiola would have to use other means of giving notice to Ms. Convergency. Parenthetically, the Connecticut form reproduces the above notice on the reverse side in the Spanish language.)

The interviewer in the Legal Aid office then asked Ms. Convergency about the members of her household. Ms. Convergency explained that she and her two children were living in separate quarters in the home of her aunt and uncle, that her aunt and uncle were very kind to help her by allowing her to live with them, and that she was careful not to impose on them. She was accustomed to buying her own food and cooking it separately for herself and her children and had very little contact with her aunt and uncle. The interviewer, through

study and experience, recognized that the Welfare Department's decision to count the aunt and uncle in as members of Ms. Convergency's household was very probably unsound and that Ms. Convergency did have valid legal grounds for opposing the discontinuance of the food stamps. And so, the interviewer, after explaining the situation to M. Convergency, filled in and mailed to the Welfare department the Form W-845 H "Request for a Fair Hearing" which had accompanied the notice that Ms. Convergency had received. The Form W-845 H read as follows:

REQUEST FOR A FAIR HEARING

Case No. _____
D.O. # _____
Sub-Office _____
Unit Supervisor _____
Issue _____
_____
Date Sent by Worker 12-7-71

I _____ _____
Name Street City

hereby request a fair hearing.

I understand that I may be represented by legal counsel or by a relative, friend, or other spokesman, if I wish, but this is not necessary. I may represent myself.

I further understand that as the appellant, I must be present at the hearing, that there will be no postponement of my hearing, except for illness, and that if I am unable to travel because of age or a disabling condition, the hearing may be held at my home.

_____ _____
Date Signed by Appellant Name of Appellant

(We said earlier that there is a middle ground in due process between the rudimentary "notice and opportunity to be heard" type and the full due process guarantees present in the serious criminal case. Welfare cut-offs fall in that middle ground. "Due process of law" for the person threatened with a cut-off of welfare benefits means (1) timely and adequate notice detailing the reasons for a proposed termination, (2) the right to appear personally with or without counsel, (3) the right to confront adverse witnesses, (4) the right to cross-examine adverse witnesses, and (5) the right to present his or her arguments and evidence.)

On December 15, 1971, the Legal Aid interviewer, Ms. Ruby Johnson, and Ms. Convergency both received the following letter:

STATE OF CONNECTICUT
STATE WELFARE DEPARTMENT
1000 ASYLUM AVENUE, HARTFORD, CONNECTICUT 06115

December 14, 1971

Ms. Barbara Convergency
550 Main Street
Hartford, Connecticut 06120

Dear Ms. Convergency:

This is in reference to your letter of recent date, concerning your request for a fair hearing because of food stamps.

In accordance with your request, a fair hearing will be held for you at the Hartford District Office of the State Welfare Department, 2550 Main Street, Hartford, Connecticut on January 11, 1972, at 1:00 P.M.

At that time you have a right to bring with you witnesses and any documentary evidence necessary to support your claim. You may be accompanied by legal counsel, but this is not necessary.

If you wish further information about this hearing, or help in preparing for it, kindly do not hesitate to consult your social worker, who will be pleased to assist you.

Should you be unable to keep this appointment, your hearing will be cancelled unless you can provide medical reason for not appearing.

Sincerely yours,

Grace Phillips
Official Designated to hold Fair Hearings

GP:kf
cc: *D.O. #1, Mr. Frank Ritchie, District Director*
: Ms. Ruby Johnson, Legal Aid Society

And so, on January 11, 1972, Ms. Convergency, accompanied by Ms. Johnson, went to the District Office for her Fair Hearing. Following is a transcript of the hearing.

Present: Ms. Barbara Convergency, Appellant; Ms. Emily Garagiola, Case Worker; Ms. Ruby Johnson, Representative; Ms. Grace Phillips, Fair Hearing Officer.

Ms. Phillips: This hearing is open. Mrs. Convergency, this hearing is being held because you were dissatisfied with some decision made by this agency. On December 8, 1971, you wrote requesting a fair hearing, and one has been scheduled for you for January 11, 1972. The purpose of this hearing is to review information already reviewed, and to afford you an opportunity to submit further evidence and information if you so desire. No decision will be made at this time, and the information and evidence will be reviewed and evaluated in light of state law and welfare policy. A decision will be sent to you in writing within thirty days of today's date. If at that point you should still be dissatisfied, you do have the right to appeal to the Circuit Court of Connecticut within thirty days of the decision. Although this is an informal hearing, anyone testifying must be under oath, so please stand and raise your right hand. (Oath Administered.) For the record, those taking part in the hearing must be identified. I will start on my left.

Ms. Garagiola: I am Emily Garagiola, case worker two with the State Welfare Department in Hartford.

Ms. Johnson: Ruby Johnson, paralegal representative, Legal Aid Society, Hartford.

Ms. Convergency: Barbara Convergency, 550 Main Street, Hartford.

Ms. Phillips: Now I understand there is only one issue here today, food stamps,

so why don't you begin, Miss Garagiola. You may read your case summary.

Ms. Garagiola: Mrs. Convergency was employed at the time she came on assistance. Her food stamps were computed and taken into consideration with her earnings. Shortly after the award was granted in November, Mrs. Convergency quit her job and both her budget and her food stamps were adjusted to reflect the loss of her earnings. On December 1, 1971, I made a home visit to Mrs. Convergency and at that time was introduced to another woman whom Mrs. Convergency identified as her aunt. I found out that Mrs. Convergency was living in the same house with her aunt and uncle. I told Mrs. Convergency that any income received by her aunt or uncle had to be reported to us for food stamp eligibility purposes. Mrs. Convergency declined to tell me about her aunt or uncle's income. Shortly after the visit, I notified Mrs. Convergency that her food stamps would have to be discontinued.

Ms. Phillips: Do you know for sure whether there is any income at all?

Ms. Garagiola: Well, during the conversation, Mrs. Convergency said her uncle was at work.

Ms. Phillips: Does your uncle work?

Ms. Convergency: Please, I don't want to get my aunt and uncle into my problems. They are kind enough to let me live with them, and I don't want them bothered with my problems.

Ms. Johnson: I'd question the Department's right to inquire into Mrs. Convergency's uncle's income. He's not a legally liable relative by state law.

Ms. Phillips: But we're talking about food stamps. As I understand the regulations, the income of all members of a household is counted in determining food stamp eligibility.

Ms. Johnson: It is our position that Ms. Convergency and her children live in one separate household and her aunt and uncle live in another separate household even though they all live under the same roof.

Ms. Phillips: I see. Well, perhaps Mrs. Convergency can describe the living arrangement for us.

Ms. Convergency: Well, it's just one house, but we don't have much to do with each other. I try not to bother my aunt and uncle, and my children spend most of the time in our room or on the back porch where they have their toys.

Ms. Phillips: Do you all eat together?

Ms. Convergency: Oh no. We don't even eat the same food. The children eat their supper before my uncle gets home, and I cook for myself and my children. My aunt has to cook for my uncle because he's on some special diet.

Ms. Phillips: Do you and your aunt shop for food together?

Ms. Convergency: Sometimes, but I always pay for my own. I wish I could pay for hers. Maybe someday.

Ms. Phillips: I see. Mrs. Johnson, do you want to ask any questions?

Ms. Johnson: No, I won't go over the testimony again. I'd just briefly state that Mrs. Convergency has been describing two separate households, not one, and I'd call your attention to the definition of a household and a public assistance household under Welfare Manual Volume 1, Supplement B, Index FS-120. It is our position, and I think it's been brought out in the testimony that Mrs. Convergency and her children are one separate household, and as such are entitled to food stamps.

Ms. Phillips: Thank you. I see no need to go into this question of income until we get this question of households decided.

Ms. Johnson: Right.

Ms. Phillips: Anything else then? All right. I wish to thank the three of you. The hearing is closed.

(In order to satisfy the due process of law, a hearing must be appropriate, fair, adequate, and reasonable. Ample opportunity to introduce evidence and make argument must be given. In this welfare cut-off case and in many other types of administrative hearings, the rights to counsel, confrontation, and cross-examination must be accomodated. How well were those rights accommodated in the present case? Can you think of variations of the above case study which would involve deprivations of due process? Suppose Ms. Johnson had wanted to argue a point of constitutional law and Ms. Phillips responded by saying: "We only deal with state statutes and welfare department regulations here.")

On February 10, 1972, Ms. Convergency and Ms. Johnson both received copies of the following memorandum of decision:

CONNECTICUT
STATE WELFARE DEPARTMENT
HARTFORD

In re: Barbara Convergency
Case No. X-00000

For fair hearing because of discontinuance of food stamps.

MEMORANDUM OF DECISION

Ms. Barbara Convergency of Hartford, also referred to as the appellant, was aggrieved because of discontinuance of food stamps, and made request for a fair hearing as outlined in Sections 17-2a and 17-2b of the 1969 Supplement to the Connecticut General Statutes.

Pursuant to said request, a fair hearing was held before the undersigned at the Hartford District Office of the State Welfare Department on January 11, 1972, of which due notice had been given and at which hearing the appellant was present and the case was fully heard.

A: FOR THE STATE WELFARE DEPARTMENT

The department worker stated that the appellant has been receiving food stamps, lives with her aunt and uncle, and has refused to reveal their incomes.

B: FOR THE APPELLANT

The appellant stated that she and her children live with her aunt and uncle. She stated that she buys and cooks her food separately from her aunt and uncle, though she sometimes shops with her aunt.

C: PERTINENT LAW

Section 17-12a of the Connecticut General Statutes provides: "The welfare department is authorized to administer the Food Stamp Program as provided by federal law."

D: PERTINENT STATE WELFARE DEPARTMENT POLICY

Manual Volume 1, Supplement B, Index FS-120 provides: "Definitions . . . Household - A group of related or non-related individuals who are not residents of an institution, but who are living as an economic unit, sharing common cook-

ing facilities and for whom food is customarily purchased in common . . . .

Public Assistance Household - A household in which all of the members are receiving a money payment under the federally aided public assistance programs authorized in the Social Security Act. A household in which the only non-assistance members are foster children may be continued to be classified as a Public Assistance Household . . . ."

E: FINDING OF FACT

The appellant and her children live with, but do not purchase their food in common with, and do not prepare their food together with, the appellant's aunt and uncle.

F: CONCLUSION OF LAW

The appellant and her children may therefore be considered a separate household, and receive Food Stamps as a Public Assistance Household.

G: DECISION

The District Office is directed to continue food stamp eligibility, considering the family as a Public Assistance Household.

Grace Phillips
Official Designated to hold Fair Hearings

From beginning to end, then, that is a complete case study of one welfare hearing in which the due process of law was adequately preserved. This same scrupulous attention to the details of due process is not always present in the administrative setting, and the paralegal should be attuned and sensitized to those sometimes small and seemingly petty instances when due process rights are pushed a little to the side. E.g., suppose Mrs. Garagiola told the hearing

officer that some neighbor told her that the Convergencys always ate together. If Ms. Phillips had allowed that sort of testimony, wouldn't Ms. Convergency's right of confrontation and cross-examination have been breached? What if Ms. Johnson wanted to file a written memorandum of law, and Ms. Phillips refused to accept it. Wouldn't Ms. Convergency's right to effective counsel have been breached? The antipoverty lawyer will recognize these and many other hypothetical examples as all too real occurrences. The ancient right of due process of law, together with its deprivation, is still very much with us.